State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

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The Honorable Kent Leonhardt
State Commissioner of Agriculture
1900 Kanawha Blvd. East
Building 1, Room E-28
Charleston, West Virginia 25305

Dear Commissioner Leonhardt:

In your capacity as Chairman of the State Conservation Committee, you have asked for an Opinion of the Attorney General about the authority of the State Conservation Committee ("SCC") and the West Virginia Conservation Agency ("SCA") to administer Clean Water Act funding. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advise upon questions of law . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission." Where this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

In 1987, Congress enacted Section 319 of the Clean Water Act, 33 U.S.C. § 1329. Under Section 319(h), the Environmental Protection Agency "shall make grants" to States "for the purpose of assisting the State in implementing" its nonpoint source pollution-management program. In 2019, EPA awarded over $165 million in grants under Section 319. *See 319 Grant Program for States and Territories*, U.S. Envtl. Prot. Agency, https://bit.ly/2G6jemJ (accessed Jan. 28, 2021). The West Virginia Department of Environmental Protection ("DEP") applies for Section 319 grants, and DEP has designated the SCC to administer them in order to help conserve and restore West Virginia waters affected by nonpoint source pollution from agricultural and construction activities.

Since the early 2000s, the SCC has, through the SCA (the administrative officer and support staff of the SCC, W. Va. Code § 19-21A-4(e)), administered Section 319 grants by providing the funds to local conservation districts. The local conservation districts either complete

the projects themselves or pass the funds on to a different agency to finish the specific project. Both DEP and EPA ultimately approve all projects funded in this way as part of the grant process. Various questions have recently arisen regarding this process for distributing Section 319 grants. Your letter seeks advice on the SCC's authority to receive Section 319 grants for purposes of improving water quality. Your letter also asks whether the SCC has power to pass those funds on to local conservation districts, and which entities may perform the projects Section 319 grant money is intended to fund.

Your request thus raises two questions of state law:

1. *May the SCC receive Clean Water Act grants used to improve water quality?*

2. *May the SCC give Clean Water Act grants to conservation districts, and if so, is the SCC required to work through conservation districts as opposed to implementing projects directly or working with other entities?*

We conclude that although some language in the governing Code section could be interpreted to allow Section 319 funds to be used for improving water quality, other text and statutory context make this outcome uncertain; seeking clarification from the Legislature is the strongest path forward. With respect to your second question, we conclude that authority to accept Clean Water Act grants for appropriate purposes includes the power to pass grants on to conservation districts. Alternatively, the SCC can use the funds itself or pay non-governmental agencies to perform the conservation projects.

Discussion

Question 1: The SCC's Governing Statute Does Not Conclusively Authorize Using Section 319 Funds For Water-Improvement Projects

The SCC may exercise only those powers that the Legislature delegates to it. Here, the SCC's governing powers are described in West Virginia Code Chapter 19, Article 21A. *See* W. Va. Code § 19-21A-4(a). These powers expressly include the ability to accept grants "from the United States or any of its agencies" to "carry[] out the policy and provisions of this article." *Id.* § 19-21A-4(g)(9). Further, the SCC has power to determine the SCA's duties, W. Va. Code § 19-21A-4(e), and may therefore designate the SCA to receive and administer federal grants like those issued under Section 319.

These provisions make clear that, as a general matter, the SCA may receive and use federal grants. The critical question is thus whether the purposes your letter identifies—water-improvement and pollution-reducing projects aimed at the State's water resources—are part of the "policy and provisions of this article." W. Va. Code § 19-21A-4(g)(9). The statutory language is

not clear on this point; although there is a good argument these purposes may be included, a reviewing court may interpret the SCC's authority more narrowly.*

The strongest language supporting a broad reading of the statute comes from Section 19-21A-2, which declares it "the policy of the Legislature" to—among other goals—"further[] the conservation, development, utilization and disposal of water, and thereby to preserve natural resources, . . . assist in maintaining the navigability of rivers and harbors, . . . and promote the health, safety and general welfare of the people of West Virginia." W. Va. Code § 19-21A-2(d). Read in isolation, there is a fair argument that programs aimed at reducing pollution in state waters relate to the "conservation" of water, which in turn can protect the State's "natural resources," *id.*, maintain navigability of state waterways, and encourage health and safety. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123, 1138 (9th Cir. 2002) (explaining that Section 319 grants help States control nonpoint source pollution to enhance water quality in navigable waters). The statute does not define the key term—"conservation"—as it relates to water, meaning courts must give the term its "common, ordinary and accepted meaning." Syl. pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee–Norse Co. v. Rutledge*, 170 W. V a. 162, 291 S.E.2d 477 (1982). And in the context of environmental regulations, water "conservation" would commonly be understood to include pollution control and reduction. *See Conservation,* Black's Law Dictionary (11th ed. 2019) (defining "conservation" of "natural resources" to include "maintenance," "protection," and "improvement").

Nevertheless, the overall structure of the SCC's enabling statutes do not suggest that its mission sweeps broadly enough to encompass addressing pollution in the State's waters. Indeed, the relevant statute does not use the term "pollution," instead repeatedly emphasizing *land-based* conservation goals. The statute's discussion of conserving water resources most often focuses on water's consequences for state lands, not the purity of the water itself. The statute specifically defines "*soil* conservation," for instance, rather than including water conservation in this broad definition. W. Va. Code § 19-21A-3(10) (emphasis added). It describes "conservation of the soil and soil resources of this state" and "control and prevention of soil erosion" as key purposes of the statute. *Id.* § 19-21A-2(d). And it discusses water most often in terms of preventing and mitigating flooding—that is, circumstances where water damages the land and soil resources. *E.g., id.* § 19-21A-2(a) (describing concerns from "erosion by water and flooding" in legislative purposes

* This letter takes no position on how the SCC's authority to engage in water quality projects interacts with other state agencies' powers. For example, the Director of Water and Waste Management Division for the DEP is the "sole person to give approval[s] or recommendation[s]" required by federal laws in "any matter relating to the water resources of the state." W. Va. Code §§ 22-11-3, 7. Thus, if the SCC is authorized to obtain and use Section 319 grants, it would still need to "cooperate" with the Director in this process. *See id.* (authorizing the Director to "cooperate" with "interested parties" to "apply for and receive" federal water quality funds).

section of statute), (b)-(c) (emphasizing damages from flood waters), (d) (including "prevention of floodwater and sediment damage" as legislative policy).

Moreover, the Legislature *has* spoken directly to issues of water quality in other statutes—most notably the West Virginia Water Pollution Control Act, W. Va. Code § 22-11-1 *et seq.* This statute describes DEP's duties to help preserve the "purity" and "quality" of state waters, and includes definitions of terms of art from the Clean Water Act, like "point source" and "pollutant." *Id.* §§ 22-11-2(a), 22-11-3(15)-(16). As a general matter, courts "presume the Legislature would not" enact a "redundant" statute. *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 352, 624 S.E.2d 783, 789 (2005). The existence of a lengthy, detailed, and intricate statutory scheme governing water quality regulation in Chapter 22 therefore could be read to suggest that the Legislature did not intend to create a second, overlapping regulatory system through a single reference to "water conservation."

The upshot is that there is a fair reading of the SCC's governing statute that authorizes water-improvement projects, but without a statutory definition of water "conservation" to make that outcome certain, a reviewing court might conclude from contextual cues that the Legislature intended the term to have a more narrow effect. The surest course forward may thus be to seek clarification from the Legislature. Adding language to the SCC's governing statute that specifically encompasses preventing and remedying pollution in state waters and helping ensure the quality of the state's water resources—not only with respect to flooding concerns—would resolve this statutory ambiguity.

Question 2: Conservation Districts May Receive Section 319 Grant Funds From The SCC, But The SCC Also Retains Discretion To Implement Projects Directly Or To Work With Other Entities.

Your letter next asks whether, in cases where the SCC has power to receive and administer Section 319 grants, the SCC may pass these funds on to local conservation districts as sub-recipients. Among the conservation districts' statutory powers is the ability "[t]o develop with the approval of [the SCC] comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion and for flood prevention or the conservation, development, utilization and disposal of water within the district." W. Va. Code § 19-21A-8(8). As explained above, this language may, but does not conclusively, authorize using Section 319 grants for water-improvement projects. Our Office explained in an opinion to the SCC five years ago that the "vast majority" of conservation districts' powers relate to "collecting information related to soil erosion, floodwater, and sediment damage; remedying identified problems; or preventing future problems." 2015 WL 336264, *2 (Jan. 20, 2015). In this context, too, legislative clarification about whether this power extends to pollution-reducing measures for water resources would thus be advisable.

Moving beyond the specific purposes for which Section 319 funds can be used, however, it is clear that conservation districts may be sub-recipients of a Section 319 grant. State law

confirms that the SCC may "[s]ecure the cooperation and assistance of the United States and any of its agencies and of agencies of this state in the work of the [conservation] districts." W. Va. Code § 19-21A-4(g)(6). Obtaining Section 319 grants and then distributing those funds to the conservation districts is a straightforward application of the SCC's ability to work with federal agencies and "[s]ecure" their "assistance" in the conservation districts' work. *Id.*

Similarly, the SCC may "[a]dminister a conservation grant program that provides financial assistance to conservation districts and others to promote approved conservation projects." W. Va. Code § 19-21A-4(g)(8). There is no requirement in this provision that funding for "a conservation grant program" come from State coffers. Especially when combined with the directive in Section 4(g)(6) to work with federal agencies, this provision confirms that conservation districts may serve as sub-recipients of Section 319 grants that the SCA administers.

This power to pass funds on to local conservation districts does not, however, mean that the SCC may not use grant funds directly, or in concert with other entities in the State. The SCC has express authority to "[a]ccept and receive . . . grants . . . from the United States or any of its agencies . . . and *use or expend* the money . . . in carrying out the policy and provisions of this article." W. Va. Code § 19-21A-4(g)(9) (emphasis added). This language makes clear that, as long as a grant's project falls within the "policy and provisions of this article," the SCC retains authority to use federal funds directly. Similarly, Section 19-21A-4(g)(8) authorizes the SCC to "[a]dminister a conservation grant program that provides financial assistance to conservation districts *and others* to promote approved conservation projects." The plain reading of this provision accordingly affirms that the SCC need not select conservation districts as the sub-recipients of Section 319 grants. Rather, the SCC may work with "others"—a broad term without additional statutory limits—to promote approved conservation projects.

Thus, assuming the SCC has the authority to use Section 319 grants, it also has authority to control how it expends them: on its own, in partnership with local conservation districts, or by designating other governmental or non-governmental organizations as sub-recipients of federal grant funds.

Sincerely,

Patrick Morrisey
Attorney General

Lindsay See
Solicitor General

Thomas Lampman
Assistant Solicitor General